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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 914

PHILLIP MICHAEL SCHEMEL,
Petitioner,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the District Court (Appendix A of Petition) is reported at 261 F. Supp. 134. The opinion of the Court of Appeals for the Seventh Circuit, and the concurring and dissenting opinions (Appendix B of Petition) are reported at 384 F. 2d 802.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

The sole question presented is whether the decision of the Court of Appeals conflicts with the law of the State of Indiana in holding, as a matter of law, that a manufacturer's legal duty does not require it to make a product that cannot be misused or to eliminate from truthful advertising descriptions of a product's capacities that might possibly incite the irresponsible to misuse it.

STATEMENT.

This was a diversity action brought by petitioner against the manufacturer of a 1960 Chevrolet. According to the complaint, petitioner was injured when the 1956 Plymouth in which he was riding as a passenger was struck in the rear by a 1960 Chevrolet then being driven at an unlawful speed of 115 miles per hour by a reckless and irresponsible third person.

Petitioner's claim against respondent was that because it knew of the reckless propensities of some drivers, it was negligent simply in having made and sold automobiles capable of being driven in excess of 100 miles per hour and in having advertised in mass media the power capabilities of its automobiles. The thrust of petitioner's claim is not that irresponsible people should be deprived of the privilege of using the highways, but rather, accepting the presence of irresponsible drivers on our roads, the courts should meet the problem of unpredictable and erratic drivers by imposing on the manufacturer the duty to protect third persons from irresponsible motorists, a subsidiary aspect of that duty requiring the manufacturer to refrain from advertising its automobiles in terms that might conceivably inspire the less stable members of society to use them dangerously.

The District Court dismissed petitioner's complaint for failure to state a claim against respondent upon which relief could be granted under Indiana law. The Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court.

SUMMARY OF ARGUMENT.

Repeatedly throughout the petition, it is incorrectly asserted that the courts below held that under Indiana law innocent bystanders have no protection against defectively made products. This is a complete distortion of the issue. Respondent conceded and the courts below recognized that under Indiana law respondent was under a duty to make its automobiles reasonably fit for their purpose and free from latent hazards or concealed dangers. Respondent's only contention was that this duty did not require it to protect against the obvious dangers to both users and bystanders of traveling at excessive speeds by limiting the speed capacity of its automobiles. The courts below agreed.

Petitioner's complaint is predicated on notions of a manufacturer's duty that are not recognized under the common law of Indiana or, for that matter, under the law of any other state. To sustain petitioner's position, a court would be required to embrace the general proposition that all manufacturers are under a duty to make products that are not subject to any recognized injurious misuse and to edit truthful advertising to avoid saying anything that might induce such misuse by erratic and irresponsible people.

The decision below is clearly correct and there is no need for this Court to review it. Under Indiana law, as well as the law generally, an automobile manufacturer like any other manufacturer must make his product reasonably fit for the *purpose* for which it is made and used and free

from hidden or concealed dangers; he is responsible for harm *caused* by his failure to do so. But there is no duty on an automobile manufacturer, or any other producer of goods in our society, to make a product that is completely "safe" from misuse. Nor is there any precedent or valid reason on which to construct a duty to excise truthful advertising of all material that conceivably might incite irresponsible people to make abusive use of a product.

Petitioner is obviously well aware that this Court seldom concerns itself with diversity actions such as this involving nothing more than the application of state law by a tribunal deemed to be an expert in the matter. In a desperate effort to entice this Court into reviewing such a decision, petitioner has proceeded to conjure up a variety of allegedly "important" questions that this case does not present. When this excelsior is removed, the fragile core of petitioner's attack on the determination under Indiana law of the duty question by the courts below is seen to consist of conclusory assertions and inapposite cases, compelling the conclusion that petitioner's complaint was, as held by the courts below, properly dismissed under that State's law.

ARGUMENT.

THE COURT BELOW CORRECTLY APPLIED INDIANA LAW IN DETERMINING, AS A MATTER OF LAW, THAT THE DUTY OF A MANUFACTURER DOES NOT ENCOMPASS THE DUTIES SOUGHT TO BE IMPOSED BY PETITIONER IN THIS CASE.

The court below decided that under Indiana law the nature and extent of the duty which the manufacturer owes presents an issue of law for the court, and that the law of Indiana does not recognize the duties which appellant seeks to impose on the manufacturer in this case, that is, a duty to design a product incapable of being misused or to refrain from advertising its product in such terms as might possibly incite an irresponsible person to misuse the product. This decision is clearly correct.

A. Duty Is Not a Fact Question Under Indiana Law.

According to petitioner, under Indiana law, the sole function of the court in a common law negligence action is to determine whether the defendant, by virtue of some relationship to the plaintiff, owes him a duty of due care. If so, it is then for the jury to determine whether the defendant was obligated to do or refrain from doing the specific thing complained of by the plaintiff (Petition, pp. 8-9). The invalidity of this is evident. Since petitioner further contends that it is the accident itself which gives rise to the necessary relationship (Petition, p. 11), in any accident case in which the plaintiff pleads that he was injured there is nothing left for the court to do but to send the case to the jury. In short, every injured plaintiff is necessarily

entitled to a jury trial. This position was specifically rejected by the court below:

> "We cannot accept the plaintiff's contention that once the Court determines that a relationship exists between the parties giving rise to some duty, the determination of the nature and extent of that duty becomes a question of fact for the jury." (384 F. 2d 802, at 804.)

So, in *Strickler* v. *Sloan, et al.* (1957), 127 Ind. App. 370, 141 N. E. 2d 863, the complaint alleged breach of a duty to install an additional safeguard. The trial court sustained a demurrer to the complaint and the Indiana Appellate Court affirmed, stating:

> "After a careful study of the authorities submitted by the appellant we concur that they are not in support of their contention and we are of the opinion that the *appellant's amended complaint is demurrable for insufficient facts because a manufacturer is not negligent for not installing a guard over open trash rollers on a cornpicker. . . .*
>
> "We cannot agree with appellant that the issues raised by the demurrer must be determined only by evidence.". (127 Ind. App. at 383, 386, 141 N. E. 2d at 870, 872.) (Emphasis added.)

Thus, even though the relationship between the parties in that case (manufacturer-user) was such that the manufacturer was under a duty to use reasonable care to avoid injuring the plaintiff, the Indiana Appellate Court nevertheless held, as a matter of law, that the manufacturer had no duty to protect the plaintiff from the injury he had sustained and there was nothing for a jury to decide.

The law question for the court in a negligence action, therefore, is not simply to determine abstractly whether the defendant owed the plaintiff some duty. The question of law also involves the particularized standard of conduct required in the situation at issue:

> "*It is for the court to determine* whether the plaintiff's interest which has suffered is protected by law *and whether the interest is protected against the 'particular hazard encountered.'*" *Swanson* v. *Slagal* (1937), 212 Ind. 394, 413, 8 N. E. 993, 1001. (Emphasis added.)

The statements quoted by petitioner from *Union Traction Co.* v. *Berry* (1919), 188 Ind. 514, 121 N. E. 655, and *Belt, etc. R. Co.* v. *McLain* (1914), 58 Ind. App. 171, 106 N. E. 742 (Petition, pp. 8-10), do not establish or even suggest that Indiana follows a novel practice of dividing the duty question between judge and jury, letting the judge determine the existence of "some" duty and then letting the jury determine the nature and extent of the duty. Nor is there support elsewhere for such a role. See *Kahn* v. *Chrysler Corporation* (D. C. S. D. Tex. 1963), 221 F. Supp. 677, 678:

> "However, who is to determine if a duty exists? Is this a matter of law or a disputed question of fact itself. Certainly there is disagreement in the instant case over whether or not the defendant had a duty to so design his vehicle that an accident like that under consideration could not happen. The very essence of plaintiff's complaint is that the defendant owed to the plaintiff a duty to manufacture an automobile with which it was safe to collide. But this is not sufficient to constitute a disputed fact issue, for this is a question of law to be determined by the court. *Whether or not a legal duty exists* on a given state of facts so as to give rise to actionable negligence on breach thereof, *as well as the nature and extent of the duty,* if any, is always essentially *a question of law.*" (Emphasis added.)

B. The Duty of a Manufacturer Under Indiana Law Does Not Require It to Guard Against Obvious Dangers.

Although at one point acknowledging that the court below held that the duty of a manufacturer was two-fold, to make products that are "reasonably fit for their intended use *and* free of latent dangers" (Petition, p. 16; emphasis supplied), petitioner concludes with a dramatic but demonstrably distorted characterization of the opinion below as having narrowed the manufacturer's duty by limiting it to avoiding only hidden defects and latent or concealed dangers (Petition, p. 24). The court below held, correctly under Indiana law, that since there was no allegation that the automobile in question was dangerous in its lawful use nor that its potential for harm was either latent or concealed, petitioner had failed to state a claim on which relief could be granted under Indiana law (384 F. 2d 802, at 804-5).

The court below relied on *Campo* v. *Scofield* (1950), 301 N. Y. 468, 95 N. E. 2d 802, approved by the Indiana Supreme Court in its most recent consideration of a manufacturer's duty, *J. I. Case Co.* v. *Sandefur* (1964), 245 Ind. 213, 220-23, 197 N. E. 2d 519, 523. The disagreement of the plaintiff-oriented text by *Frumer & Friedman, Products Liability,* § 7.02, p. 114, quoted by petitioner, or petitioner himself with the philosophy of the *Campo* decision (Petition, pp. 16-18) is beside the point. In applying the law of Indiana, the court below took the latest relevant opinion of the Indiana Supreme Court as its guide, and that opinion, in turn, showed Indiana's agreement with *Campo:*

> "Just as the manufacturer is under no obligation in order to guard against injury resulting from deterioration, to furnish a machine that will not wear out, . . . so he is under no duty to guard against injury from a patent peril or from a source manifestly dan-

> gerous . . . In other words, the manufacturer is under no duty to render a machine or other article 'more' safe—as long as the danger to be avoided is obvious and patent to all.
>
> * * * * * *
>
> "* * * Professor Bohlen in his work on Torts, after noting 'the impolicy of requiring the manufacturer to make so perfect a machine as to be incapable of injurious misuse', goes on to say (op. cit., p. 126): 'As to this there can be no two opinions . . . The manufacturer cannot be required to contemplate a misuse by any careless, ignorant, or incompetent person into whose hands the machine may come; injury through the medium of such an agency is neither a probable nor natural result of anything done or left undone by the maker.'' (95 N. E. 2d at 804, 805.)

The *Campo* case was also followed by the Indiana Appellate Court in *Strickler* v. *Sloan, et al.* (1957), 127 Ind. App. 370, 141 N. E. 2d 863, discussed above.

The Indiana courts' endorsement of *Campo* aligns Indiana with all those jurisdictions which hold that, in the absence of some hidden or concealed danger, a product which is reasonably fit for its intended purpose fulfills the manufacturer's duty, even though the article can be used irresponsibly to cause harm.

Here, there is no contention that the product in question did not function for the purposes for which automobiles are generally used nor does the petitioner complain about any hazard that was latent or concealed. Therefore, under the law of the State of Indiana, the complaint lacked any allegation that the manufacturer had violated its recognized duties—to make a product reasonably fit for its intended purpose and free from any latent or concealed hazards.

Petitioner does not quarrel with the conclusion of the court below that the dangers from excessive speed "are

neither latent nor concealed." (384 F. 2d 802, at 805.) He argues only that this is irrelevant because he was not a user of the automobile, but an innocent bystander:

> "As petitioner in the case now before the court was an innocent bystander and had no control whatsoever over the respondent's product, it is perfectly ridiculous to even consider whether the danger was latent. The *Campo* case is, therefore, not relevant, and should not be considered because the court was thinking in terms of a careless, ignorant, or incompetent person injuring himself through misuse." (Petition, pp. 16-17.)

In effect petitioner is saying that a manufacturer must make a safer product for an innocent bystander than he must make for a user, which is absurd on its face. Petitioner cites no authority whatever for this proposition. The cases cited, at pages 18-22 of the petition, in which innocent bystanders were permitted to recover, all involved products with hidden or concealed defects. None of these cases contains even the slightest suggestion that a manufacturer's duty to an innocent bystander is any different than its duty to a user; and at least one—*Mitchell* v. *Miller, et al.* (1965), 26 Conn. Supp. 142, 214 A. 2d 694 (Petition, p. 20) indicates the exact opposite with the statement:

> "The public policy which protects the user and consumer should also protect the innocent bystander . . ." (214 A. 2d at 699.)

C. The Manufacturer's Duty Is Not Equated to What He Can Foresee.

The manufacturer's duty does not, as petitioner claims, extend to dangers arising from any use of the product, so long as such use is foreseeable (Petition, pp. 18-19). This position erroneously equates the test for determining a legal duty with what is foreseeable:

> "It is frequently said that if the defendant as an

> ordinarily prudent person foresaw or should have foreseen some harm to the victim or other person so situated, defendant was under a duty to exercise reasonable care to avoid such harm. This is a valuable formula for submitting the issue in violation of duty in a negligence case to a jury, but it is not an adequate or reliable formula for the judge in determining the scope or extent of the defendant's duty. The determination of the issue of duty and whether it includes the particular risk imposed on the victim ultimately rests upon broad policies which underlie the law." (Green, "Duties, Risks, Causation Doctrines" (1962), 41 Tex. L. Rev. 42, at 45.)

In short, a danger must be foreseeable to a manufacturer before he has a duty to take action, but the reverse is not true. He is not required to take action with respect to all he can foresee—specifically, he is not required to guard against all dangers arising from a misuse of his product which are obvious to all. The two cases cited by petitioner in support of this argument are not in point. Both involved products with *concealed* dangers.

In *Spruill* v. *Boyle-Midway, Inc.* (4 Cir. 1962), 308 F. 2d 79 (Petition, p. 18), the product, a furniture polish, was sold without an adequate warning on its label of its deadly poisonous characteristics. And in *Lovejoy* v. *Minneapolis-Moline Power Implement Company* (1956), 248 Minn. 319, 79 N. W. 2d 688, a tractor was equipped with a pulley which disintegrated when driven at a faster speed than recommended by the manufacturer. Again, the manufacturer had not warned the user of the danger and it was not apparent.

Likewise, the petitioner cites this Court's decision in *Parks* v. *Simpson Timber Co.* (1967), 388 U. S. 459, as definitive of the scope of a manufacturer's duty (Petition, p. 15). His claim is that the decision below conflicts with *Parks*. This obviously is not so. *Parks* was a "concealed

danger'' case, involving Oregon law, which held only that the correct standard of due care is objective rather than subjective. In short, it is not necessary that a manufacturer know that its product might inflict injury on plaintiffs to whom a duty was owed; it was enough that a reasonably prudent manufacturer would have so known.

The case at bar is not a concealed danger case. There is no allegation of any failure to warn. In any event, all *Spruill, Lovejoy* and, in effect, *Parks,* say is that, where the danger is latent or unexpected, the manufacturer is required to give warning that the product may be dangerous if used in a certain way; they do not hold that the manufacturer is liable simply by virtue of having built the product. In this case, if injury had resulted because the automobile in question had disintegrated (*i.e.,* because it was unfit to be driven 115 miles per hour), and the manufacturer had failed to warn of this characteristic, obviously we would have an entirely different claim, one to which these cases might be applicable.

D. Petitioner Confuses Duty With Proximate Cause.

Petitioner also argues that the court below was incorrect in adopting the *Restatement* position that the duty of a manufacturer is limited to guarding against dangers arising from a lawful use of his product. Essentially his argument is that the Restatement was misinterpreted and, in any case, differs from the Indiana law. Petitioner concedes, as he must, that Section 395 of the *Restatement of Torts, Second,* limits the manufacturer's liability to physical harm caused by the ''lawful use'' of his product (Petition, p. 13). But he argues that this doesn't mean what it says, because the *Restatement* elsewhere says (Sections 302, 302A and 302B) that a defendant's negligent act which causes an injury will not be excused by an intervening negligent act of another which contributes to the injury,

if such intervening act was reasonably foreseeable; and he cites numerous cases which so hold. (Petition, pp. 12-15.)

This, however, is confusing causation with duty, which is begging the question. The court below did not hold that the recklessness of the driver of the automobile in question was an independent, intervening cause which excused a breach of duty by respondent. It held, and properly so, that respondent had breached no duty owed to petitioner in failing to anticipate and guard against the obvious danger arising from a driver's reckless operation of the automobile.

The Indiana cases which petitioner cites in support of his position are obviously inapposite, because of facts which he fails to mention in his petition. One involved the sale of cartridges to minors in violation of a criminal statute, (*Binford* v. *Johnson* (1882), 82 Ind. 426); one the entrustment of an automobile to an unlicensed minor in violation of a criminal statute, (*Smith* v. *Thomas* (1955), 126 Ind. App. 59, 130 N. E. 2d 85); and one holds that a person selling liquor to minors or drunks in violation of a criminal statute may be held liable for resulting harm, (*Elder* v. *Fisher* (1966), ... Ind. ....., 217 N. E. 2d 847). In the absence of any contention that respondent sold its product to a minor or a drunk in violation of a statute, it is difficult to see what support petitioner finds in these cases.

In a case in which petitioner is contending for the recognition of a duty to protect him against risks created by the foreseeable misconduct of others, cases such as *S. I. G. & E. Co.* v. *Caine* (1964), 136 Ind. App. 379, 198 N. E. 2d 14; *Northern Indiana Transit, Inc.* v. *Burk* (1949), 228 Ind. 162, 176, 177, 89 N. E. 2d 905; and *New York Cent. R. R.* v. *Cavinder* (1965), ... Ind. App. ....., 211 N. E. 2d 502 (Petition, pp. 13-15), are likewise irrelevant. These cases hold only that a party whose *initial* negligence combines

with the subsequent, foreseeable negligence of another party, is not thereby relieved of the consequences of his negligence but can be held jointly liable with the other negligent party. The negligence with which the original actor was charged in those cases was its own and *not* simply its failure to anticipate and protect against the foreseeable creation of danger by the subsequent actor.

E. The Reliance of the Court Below on Evans v. General Motors Corp. (7 Cir. 1966), 359 F. 2d 822, Cert. Den. 385 U. S. 836, Was Proper.

Petitioner contends that *Evans* v. *General Motors Corporation* (7 Cir. 1966), 359 F. 2d 822, *cert. den.* 385 U. S. 836, which the courts below held controlling, is neither applicable to this case nor correct.

In *Evans,* the plaintiff's husband had been killed in a collision in Indiana when the 1961 Chevrolet he was driving was struck broadside by a 1959 Ford travelling 75 miles per hour. The claim there, in effect the counterpart of the claim here, was against the manufacturer of the struck vehicle (here it is against the manufacturer of the striking vehicles), and was that because collisions between automobiles are foreseeable, automobile manufacturers have a duty to design their automobiles so as to protect the occupants from injury or death in collisions. The district court dismissed the complaint in that action for failure to state a claim and the Seventh Circuit affirmed, on the ground that the automobile manufacturer's duty does not require it to make its product safe or safer to engage in collisions, stating:

> "The major question before us is the nature of the duty which an automobile manufacturer owes to users of its products. This presents an issue of law for the Court. *Union Traction Co.* v. *Berry,* 1919, 188 Ind. 514, 520-1, 121 N. E. 655, 657; *Kahn* v. *Chrysler*

Corporation, D. C. S. D., Tex. 1963, 221 F. Supp. 677, 678.

"The defendant concedes that it had a duty to design its automobile to be reasonably fit for the purpose for which it was made, without hidden defects which would make it dangerous to persons so using it.

"* * *

"A manufacturer is not under a duty to make his automobile accident-proof or fool-proof; nor must he render the vehicle 'more' safe where the danger to be avoided is obvious to all. *Campo* v. *Scofield,* 1950, 301 N. Y. 468, 95 N. E. 2d 802, 804. Perhaps it would be desirable to require manufacturers to construct automobiles in which it would be safe to collide but that would be a legislative function, not on aspect of judicial interpretation of existing law. *Campo* v. *Scofield, supra,* 805.

"* * *

"The intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such collisions may occur." (359 F. 2d at 824, 825.)

Both the district court and the court below held that the principles announced in *Evans* were controlling here. 261 F. Supp. at 135; 384 F. 2d at 804.

The court below completely disposed of petitioner's contention that the *Evans* case is not applicable here:

"We are not convinced by the plaintiff's contention that *Evans* is not applicable. The plaintiff here, like the plaintiff in *Evans* sought to impose on the automobile manufacturer a duty to design an automobile incapable of causing injury (or capable of minimizing injury) through foreseeable misuse for a purpose for which the automobile was never supplied." (384 F. 2d 802, at 805.)

There has been no criticism of *Evans* from any court. Quite the contrary, that decision has been expressly fol-

lowed by the Fifth and Sixth Circuits in *General Motors Corporation* v. *Muncy* (5 Cir. 1966), 367 F. 2d 493; and *Krentz* v. *Union Carbide Corporation* (6 Cir. 1966), 365 F. 2d 113. See also *Willis* v. *Chrysler Corp.* (D. C. S. D. Tex. 1967), 264 F. S. 1010, 1011, and *Royal* v. *The Black and Decker Manufacturing Company,* C. C. H. Products Liability Reports, para. 5878 (Nov. 7, 1967).

And *most* important is the inherent soundness of the *Evans* decision and its application in this case by the court below. A contrary decision would have launched the Courts of Indiana, at least, on a journey with no foreseeable end. In fact, although petitioner acknowledges in his statement of questions presented (Petition, p. 3) that this case involves only the application of Indiana law, he invites this Court to undertake the same journey, by arguing that this Court can turn this case into a vehicle for taking "the greatest step forward in promoting automobile safety" (Petition, pp. 6-7).

We do not believe that this specious appeal will cause this Court to ignore the fact that this case is a diversity action in which the sole function of this Court is to determine if Indiana law was properly applied. Nonetheless, the fallaciousness of petitioner's reasoning in this respect demonstrates the basic wisdom of the *Evans* case and the decision of the court below in this case.

In the first place, petitioner is less than candid with this Court when he implies that he seeks only to influence future design, to force automobile manufacturers to "stop designing their automobiles with such unreasonable speed capacity and emphasizing that speed in their advertising." (Petition, p. 6.) Petitioner was struck by an automobile designed prior to 1960. There are millions of already-designed motor vehicles on the road today, which are capable of being driven in excess of 100 miles per hour.

According to petitioner, all of these automobiles are defective.

Thus petitioner does not seek merely the formulation of a design standard for the future. He seeks the imposition of an *ex post facto* standard for millions of automobiles already produced and in daily use on the highways. See the *Cornell Law Quarterly* note on the *Evans* case which finds the court's decision to defer to the legislature "strategically sound" for this reason. 52 *Cornell L. Q.* 444.

Moreover, the standard which petitioner seeks to impose retroactively is really no standard at all. He is not requesting that courts, in defining the automobile manufacturer's duty, determine the maximum safe speed for automobiles. Under his concept that the sole function of the court is to determine whether "some" duty was owed, he is necessarily saying that juries are to be permitted to fix the standard retroactively on a case-by-case basis. In this case the jury will be free to decide retroactively that 115 miles per hour is too fast. In the next case the jury will be free to decide retroactively that 95 miles per hour is too fast; in the next, 80 miles per hour, *ad infinitum*.

It was this motion which prompted the District Court below to observe that:

> "Obviously, if regulation in this area is to come—and we do not say it should not—it should come in the form of an act which would apply a uniform national standard to a highly centralized national industry, and not be hammered out, higgledly-piggledy, on a case to case basis with all of the disparsity which would inevitably result." (261 F. Supp. at 136.)

Petitioner, of course, ignores the plain fact that an automobile can be driven dangerously fast, although within the posted speed limit, with injury and death just as certain to occur. His hindsight notion that he would not have been injured, or would have been less seriously injured, if he

had been hit at 80 miles per hour instead of 115 miles per hour is just so much speculation. All accidents are avoidable by hindsight and speculation, but this is not standard for a manufacturer's liability for negligence.

Neither can petitioner's theories of liability be viewed simply from the standpoint of automobiles and automobile manufacturers. Petitioner obviously believes that the common law should be changed for automobile manufacturers because of the seriousness of the automobile accident problem. But the common law does not have different rules for different manufacturers. It has one rule for all manufacturers, and any suggested change of that rule has got to be viewed from the standpoint of all manufacturers.

If the common law is to be, as petitioner suggests, that an automobile manufacturer is to be held responsible for an accident when he merely fails to make his product so that it cannot be misused, to harm another, then every manufacturer will be subject to the same liability, including the manufacturers of knives and guns who fails to make them so that they cannot be used to harm others. There is not a product that cannot be misused in countless ways to harm others.

In one of the most carefully considered products liability cases of recent years, the Court of Appeals for the District of Columbia said in *Jamieson* v. *Woodward & Lothrop* (D. C. Cir. 1957), 247 F. 2d 23, 26, *cert. den.* 355 U. S. 855:

> "The law does not require that an article be accident proof or incapable of doing harm. It would be totally unreasonable to require that a manufacturer warn or protect against every injury which may ensue from mishap in the use of his product. Almost every physical object can be inherently dangerous or potentially dangerous in a sense. A lead pencil can stab a man to the heart or puncture his jugular vein, and due to that potentiality it is an 'inherently dangerous' object; but, if a person accidentally slips and falls on a pencil in

his pocket, the manufacturer of the pencil is not liable for the injury. He has no obligation to put a safety guard on a lead pencil or to issue a warning with its sale. A tack, a hammer, a pane of glass, a chair, a rug, a rubber band, and myriads of other objects are truly 'inherently dangerous' because they might slip . . . A hammer is not of defective design because it may hurt the user if it slips. A manufacturer cannot manufacture a knife that will not cut or a hammer that will not mash a thumb or a stove that will not burn a finger."

Petitioner's conjecture (Petition, pp. 23-24) as to the intent of Congress in enacting Section 108(c) of the National Traffic and Motor Vehicle Safety Act of 1966 is completely without support in the legislative history of the Act, which is replete with references to the desirability and, in fact, the necessity of imposing one single standard with which all automotive manufacturers would comply. One of the most vocal critics of the American automobile, Professor Jeffrey O'Connell, acknowledges:

> "* * * judicially induced reform would of necessity be episodic and disorganized, dependent upon the fortuitous circumstances of individual lawsuits. * * * The imposition of safety standards on the automobile industry can most likely be achieved better by a consistent application of regulatory standards drawn up by experts and kept current by research, rather than by *ad hoc* decisions of inexpert judges and juries." O'Connell, "Taming the Automobile," 58 N. W. U. L. Rev. 299, 375 (1963).

F. Petitioner Was Not Erroneously Deprived of a Jury Trial.

It is of course basic that petitioner was not deprived of his constitutional right to a jury trial if his complaint was properly dismissed for failure to state a claim upon which relief could be granted.

CONCLUSION.

The opinion of the Court below correctly applied the law of the State of Indiana and neither petitioner's superficial criticism of that opinion nor the imaginary issue injected in the petition to interest the Court would justify further review of this case.

Respectfully submitted,

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